

Pursuant to a Data Practices challenge made on February 3, 2010, this document is amended to note that Gladiator Exteriors, Inc. is now under new ownership

OAH 8-1902-20649-2

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF LABOR AND INDUSTRY

In the Matter of Gladiator Exteriors, Inc.

**FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDATION**

This matter came on for an evidentiary hearing before Administrative Law Judge Eric L. Lipman on November 6, 2009, at the Saint Paul offices of the Office of Administrative Hearings.

Michael J. Tostengard, Assistant Attorney General, appeared on behalf of the Minnesota Department of Labor and Industry (Department). Stuart D. Luhm, in his capacity as sole owner of the corporation,¹ made an appearance on behalf of Gladiator Exteriors, Incorporated (Respondent or Gladiator Exteriors). The hearing record closed following the adjournment of the evidentiary hearing.

STATEMENT OF THE ISSUES

1. Did Mr. Luhm, working on behalf of Gladiator Exteriors, submit false and misleading information to the Department in connection with an application for licensure?
2. Has Mr. Luhm engaged in acts that demonstrate that he is unqualified to act as the qualifying person for a residential building contractor?

The Administrative Law Judge concludes that while Mr. Luhm should not be sanctioned for submitting a false application to the Department, the Commissioner of Labor and Industry should deny the Respondent's application for a residential contractor's license.

¹ Compare, Minn. Stat. § 481.02 (3)(15) (2008) with Minn. R. 1400.5800 (2007).

FINDINGS OF FACT

1. On March 17, 2009, Stuart D. Luhm submitted an application for a residential building contractor's license on behalf of his corporation, Gladiator Exteriors.²

2. Mr. Luhm had earlier passed the residential building contractor test and paid the required application fee.³

3. As part of the application for a Residential Building Contractor License, applicants are required to provide background information on any "qualifying persons" of the licensed entity. The form inquires whether the applicant or the applicant's qualifying person has "[b]een charged, indicted, pleaded to, or convicted of any criminal offense in any State or Federal Court in the last 10 years," instructs the applicant to include "felonies, gross misdemeanors or misdemeanors" other than traffic violations, and directs applicants responding "yes" to this question to attach "a written statement, signed and dated by the applicant, explaining the circumstances of each incident." Mr. Luhm signified that he had been the subject of such a conviction; noting that "[o]n July 16th, 2006, I was arrested with some drugs and charged with a felony."⁴

4. The sentence on Mr. Luhm's conviction for sale of a controlled substance in the second degree expires in June of 2010.⁵

5. Further, as part of the application, Mr. Luhm pointed to his work history while he was incarcerated in a Minnesota Department of Corrections' facility during the period between January 2007 and January 2008.⁶

6. In the application for licensure, Mr. Luhm did not detail his 2005 misdemeanor conviction for Tampering with a Motor Vehicle.⁷

7. Thomas Sendecky, a senior investigator for the Department, reviewed the application submitted by Respondent. As with all such applications, Mr. Sendecky undertook a criminal background check on the qualifying person.⁸

8. The Department evaluated the criminal complaint and accompanying materials underlying Mr. Luhm's 2006 conviction to determine if the allegations would affect the application for a residential contractor's license. The Department considered the misconduct by Mr. Luhm, found that the underlying conduct directly related to the

² See, Ex. 1; Testimony of Stuart D. Luhm.

³ *Id.*

⁴ See, Exhibit 1 at 5 and 8.

⁵ Testimony of Thomas Sendecky; Testimony of Stuart D. Luhm.

⁶ Ex. 1 at 4.

⁷ Exs. 1 and 2.

⁸ Test. of T. Sendecky.

occupation of residential contractor, and determined that the criminal convictions brought into question Mr. Luhm's fitness to serve as a qualifying person for a residential contractor. The Department ultimately concluded that it would not be in the public's interest to issue a license to Mr. Luhm's company, Gladiator Exteriors.⁹

9. On June 1, 2009, the Department served Mr. Luhm with a Licensing Order denying Gladiator Exteriors' application for a residential building contractor's license.¹⁰

10. The Order notified Mr. Luhm that, unless he requested a hearing within 30 days, the Order would become a final order of the Commissioner.¹¹

11. On June 19, 2009, the Department received Mr. Luhm's request for a hearing to contest the denial of his application for a residential building contractor's license.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Administrative Law Judge and the Commissioner of Labor and Industry are authorized to consider the charges against Respondent under Minn. Stat. §§ 14.50, 45.027, 326.91 and 364.06.

2. Respondent received due, proper and timely notice of the charges against it, and of the time and place of the hearing. This matter is, therefore, properly before the Commissioner and the Administrative Law Judge.

3. The Department has complied with all relevant procedural legal requirements.¹²

4. The burden of proof in this proceeding is upon the Respondent to show by a preponderance of the evidence that it should be granted a residential contractor license.

5. The Commissioner of Labor and Industry may deny a license application if the Commissioner finds that it is in the public interest to do so and the applicant either has "violated any law, rule, or order related to the duties and responsibilities entrusted to the commissioner,"¹³ or the applicant has "engaged in an act or practice, whether or not the act or practice directly involves the business for which the person is licensed or

⁹ *Id.*

¹⁰ See *also*, Minn. Stat. § 326B.082 (11) and (12).

¹¹ See *also*, Minn. Stat. § 326B.082 (8) and (12) (2008).

¹² See, Minn. R. 1400.7300 (5) (2005).

¹³ See, Minnesota Statutes § 45.027 (7)(a)(2) (2008).

authorized, which demonstrates that the applicant or licensee is untrustworthy, financially irresponsible, or otherwise incompetent or unqualified to act under the authority or license granted by the Commissioner.”¹⁴

6. A controlled substance crime in the second degree, and a recent misdemeanor property offense, are sufficiently related to the duties of a residential building contractor so as to forestall licensure. This conduct is grounds for denial of a license under the relevant statutes in that it constitutes deceptive and dishonest practices and further demonstrates that Mr. Luhm is not sufficiently responsible to hold a position of trust.

7. Gladiator Exteriors has failed to demonstrate that it is appropriate, and in the public’s interest, to grant it a residential building contractor license.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED that the Commissioner of the Minnesota Department of Labor and Industry deny Respondent’s application for a residential contractor’s license.

Dated: November 30, 2009

s/Eric L. Lipman

ERIC L. LIPMAN
Administrative Law Judge

Reported: Digital Recording
No transcript prepared

¹⁴ See, Minnesota Statutes § 45.027 (7)(a) (4) (2008).

NOTICE

This report is a recommendation, not a final decision. The Commissioner of the Department of Labor and Industry will make the final decision after a review of the record. The Commissioner may adopt, reject or modify the Findings of Fact, Conclusions and Recommendation. Under Minn. Stat. § 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact Steve Sviggum, Commissioner, Attention: Wendy Willson Legge, Director of Legal Services, Minnesota Department of Labor & Industry, 443 Lafayette Road, St. Paul, MN 55155 (651) 284-5126 to learn the procedure for filing exceptions or presenting argument.

If the Commissioner fails to issue a final decision within 90 days of the close of the record, this report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. In order to comply with this statute, the Commissioner must then return the record to the Administrative Law Judge within 10 working days to allow the Judge to determine the discipline to be imposed. The record closes upon the filing of exceptions to the report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

Under Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

MEMORANDUM

The Department asserts that Respondent is not entitled to a residential contractor's license because Mr. Luhm "submitted false and misleading information to the State in connection with an application for licensure" and "has shown to be unfit to act under a license granted by the Commissioner."¹⁵

Mr. Luhm does not dispute that he was charged and convicted of a serious controlled substance crime, but argues that the passage of time since his guilty plea, his completion of the Challenge Incarceration Program, and the fact that he has remained law-abiding since the conviction, make it appropriate to now issue him a residential contractor's license. The Respondent also emphasizes that he truthfully disclosed the conviction on his application and has taken full responsibility for the mistakes he made.

Count I - Claim of a False and Misleading Application:

The Department asserts that because Mr. Luhm did not disclose his 2005 misdemeanor conviction on the Department's application form, the application submitted by Mr. Luhm is "incomplete and false."

While the Administrative Law Judge agrees that the application form requires documentation of all misdemeanor convictions, and the Department is fully entitled to receive these items before it must pass upon a request for licensure, the record does not provide a basis for concluding that Mr. Luhm's submissions were deliberately false or misleading. The better understanding of the hearing record is that Mr. Luhm forgot to include this detail in his submissions.

In this context, it is significant that Mr. Luhm called the Department's attention to both his felony controlled substance conviction and his term of incarceration.¹⁶ Likewise important, the Department's investigator, Mr. Sendeky, testified persuasively that as a matter of routine he undertakes criminal background checks on license applicants. Thus, the lack of specific documentation from Mr. Luhm would not have resulted in the misdemeanor conviction eluding Investigator Sendeky or his team.¹⁷

Sanctions for violations of Minn. Stat. § 326B.082, subd. 11(b)(2) and the false claim provisions of Minn. Stat. § 326B.84(1) should be reserved for those instances where there is evidence that the applicant affirmatively acted to mislead the Department.¹⁸ On this point, the Commissioner of Labor of Industry's final decision *In*

¹⁵ *Notice and Order for Pre-Hearing Conference*, OAH Docket No. 8-1902-20649-2 at 2-3.

¹⁶ See, Exhibit 1 at 4 and 5.

¹⁷ Testimony of T. Sendeky.

¹⁸ *Compare*, Minn. R. 2891.040 (A) (2007) (It is a dishonest practice to make a "misrepresentation of material fact by the applicant in obtaining a license"); *In the Matter of the Residential Building Contractor License of Great Lakes Builders and Remodelers, Inc.*, OAH Docket No. 8-1005-11810-2 (1999) (<http://www.oah.state.mn.us/aljBase/100511810.sd.htm>) (applicant affirmatively misled the Department as to his relationship to another business entity); *compare also*, *In the Matter of the Unlicensed Residential Building Contractor Activity of Joseph Penrose*, OAH Docket No. 7-1005-14143-2 (2001)

the Matter of the Residential Building Contractor's License of Daniel Ivan Petrie, OAH Docket No. 8-1902-17514-2 (2006) is both helpful and instructive.¹⁹ Count I of the Statement of Charges should be dismissed.

Count II – Claim of Lack of Qualification:

The facts are likewise sufficient to support the conclusion that the property and drug crimes which Mr. Luhm committed directly relates to the occupation of a residential contractor. As detailed in the testimony of the Department's investigator, Mr. Sendecky, licensed residential building contractors have unfettered access to the homes of consumer clients and occupy privileged positions of trust for these consumers. Minnesota's license application process protects consumers from potentially unscrupulous contractors and is in the public interest.

While it is true that nearly three years has elapsed since Mr. Luhm was convicted of his controlled substance crime, and that he wishes to move in a different and more productive direction, the Administrative Law Judge agrees with the Department that Mr. Luhm's earlier misconduct relates to his fitness for a residential building contractor license. The nature and seriousness of the crimes for which he was convicted, the circumstances relating to those crimes, and the fact that he continues to be under court supervision for his earlier misconduct,²⁰ all provide reasonable support for denial of the license application. Respondent has not provided sufficient evidence of Mr. Luhm's present fitness for licensure.

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(<http://www.oah.state.mn.us/aljBase/100514143.drft.htm>) (licensee affirmative misled the Department as to the ownership of the business entity).

¹⁹ See, *In the Matter of the Residential Building Contractor's License of Daniel Ivan Petrie*, OAH Docket No. 8-1902-17514-2 (2006) (<http://www.oah.state.mn.us/aljBase/190217514.finalrpt.htm>) *aff'd by the Commissioner* (DOLI 2007) (<http://www.oah.state.mn.us/aljBase/final/190217514-p.pdf>).

²⁰ Compare Test. of S. Luhm with Minn. Stat. § 364.03 (3)(a)(3) (2008) (among the minimum elements for a showing of "sufficient rehabilitation" under the disqualification statute is a discharge from supervision).